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Transforming Water Transfers: The Evolution of Water Transfer Case Law and the NPDES Water Transfers Proposed Rule

Sara Colangelo*

Water transfers, the human-induced movement of water from one place to another, have historically sustained development of vast areas of otherwise uninhabitable land in the western United States, and have recently become a popular method for alleviating water allocation problems and scarcity in the eastern United States. As demands on water resources continue to grow, however, critical questions have arisen regarding how best to provide adequate water quantity while preserving water quality.

On June 7, 2006, the Environmental Protection Agency (EPA) published its National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule. The proposed rule codified the Agency’s position that the NPDES provision of the Clean Water Act (CWA) is inapplicable to water transfers, and that the movement of water during the transfer does not constitute an “addition” of a pollutant under the CWA, even when the source water contains pollutants the receiving water does not. The EPA asserts that its proposed rule will facilitate the implementation of water transfers by exempting them from certain requirements under the Clean Water Act. The proposed rule was a response to the 2004 Supreme Court decision, South Florida Water Management District v. Miccosukee Tribe of Indians, wherein the Court left open the critical question of whether a permit would be required when a water transfer results in the addition of pollutants into the receiving water.

To explore the context and evaluate the implications of the proposed rule, this Comment examines the development of water transfer case law preceding the rule, analyzes the proposed rule in light of this precedent and the

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* J.D. Georgetown University Law Center, 2007; B.A. Brown University, 2002. The author would like to thank Professor William Butler for his highly valuable input on this Comment. The author also gives many thanks and gratitude also to Professors Richard Lazarus and Hope Babcock for their insight and thoughtful advice on this topic.
Miccosukee case, and evaluates its viability based on the plain meaning of applicable CWA provisions, statutory construction, and congressional intent.

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INTRODUCTION

The human-induced movement of water from one place to another has enabled and sustained the development of vast areas of the United States that would have been otherwise uninhabitable. This transport of water, or water transfer, has until relatively recently, occurred under a fragmented regulatory scheme with little or no oversight of the impacts that the addition of water from one source into another water body may have on the quality of the receiving water. Historically, water law issues have been of primary concern in western states because western geology and climate have made it necessary to reallocate scarce water resources for purposes such as irrigation, power generation and transporting drinking water. In recent years, however, demands on water resources have continued to grow, forcing eastern states to bring their own concerns to the legal arena. As the nation’s water resources face increasing demand, and water transfers receive heightened focus as a tool to alleviate water scarcity, critical questions arise regarding how best to provide adequate water quantity while preserving water quality.

On June 7, 2006, the Environmental Protection Agency (EPA or Agency), in an attempt to address these issues, published its National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule.\(^1\) The proposed rule defines a water transfer as “an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use.”\(^2\) The EPA asserts that its proposed rule will facilitate the implementation of water transfers by exempting them from certain requirements under the Clean Water Act. In order to achieve a complete understanding of the context and implications of the proposed rule, it is helpful to examine the development of water transfer case law that has preceded the rule. This Comment traces the evolution and discusses the implications of water transfer case law, analyzes the EPA’s Water Transfers Proposed Rule, and argues the proposed rule is ill advised.

The proposed rule codified the Agency’s position, previously articulated in an interpretive memorandum published on August 5, 2005,\(^3\) that the NPDES provision, section 402 of the Clean Water Act (CWA), is inapplicable to water transfers in most cases.\(^4\) Based on the EPA’s contention that the movement of water during a water transfer does not constitute an “addition” of a pollutant under the CWA, even when the source water contains pollutants the receiving water does not, the rule would exempt water transfers from the category of

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2. Id. at 32,887.
4. NPDES Water Transfers Proposed Rule, supra note 1, at 32,889.
discharges requiring a permit under the CWA.\textsuperscript{5} The EPA argues that, considering the CWA as a whole and the Agency’s customary practice, “Congress intended for water transfers to be subject to oversight by water resources management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA.”\textsuperscript{6}

The memorandum and proposed rule were reactions to the 2004 Supreme Court decision, \textit{South Florida Water Management District v. Miccosukee Tribe of Indians}, wherein the Court vacated a decision by the Eleventh Circuit holding that an NPDES permit would be required when a water transfer between waters of the United States added pollutants to the receiving water.\textsuperscript{7} The Supreme Court did not resolve this issue on the merits, but remanded for further fact finding by the district court as to whether the two bodies of water at issue in \textit{Miccosukee} were “meaningfully distinct,” and thus included under the NPDES permitting program.\textsuperscript{8} The critical issue, however—whether a permit would be required where the transfer results in the addition of pollutants into the receiving water—has not been decided by the Supreme Court.\textsuperscript{9} The EPA’s proposed rule therefore has serious implications for the ultimate resolution of this question.

Although the EPA presents plausible statutory construction and legislative history evidence in support of the proposed rule, a plain meaning examination of the Clean Water Act’s text reveals fatal flaws in the Agency’s rationale. The ordinary language of the statute will and should be the primary focus of a judicial inquiry into the applicability of the NPDES permitting scheme to water transfers. The most recent courts to face this issue have concluded that the CWA text’s meaning is clear—water transfers exempted under the proposed rule do indeed require an NPDES permit.\textsuperscript{10} These courts have declined to give deference to the EPA’s “holistic” statutory construction rationale, under which the Agency claims the term “addition” should be understood in the context of the entire statute rather than focusing on its plain meaning within a specific provision.\textsuperscript{11} Moreover, the proposed Water Transfers Rule raises general policy concerns regarding the NPDES program under Clean Water Act. The primary tool with which Congress intended to protect water quality must be preserved at a time when agency action and court decisions appear to have diminished the federal reach of the CWA.\textsuperscript{12} Indeed, courts consistently recognize the NPDES permitting program’s imperative role in the CWA, labeling it “the centerpiece

\textsuperscript{5} Id. at 32,891.
\textsuperscript{6} Id. at 32,889.
\textsuperscript{7} 541 U.S. 95, 112 (2004).
\textsuperscript{8} Id.
\textsuperscript{9} Id. at 111.
\textsuperscript{10} See infra Part II.E.
\textsuperscript{11} See infra Part III.A.i.
\textsuperscript{12} See infra note 188.
of the CWA,"\textsuperscript{13} "the most important component of the [CWA]."\textsuperscript{14} and the "linchpin of the [CWA]."\textsuperscript{15} Federal authority to use such a critical tool to protect the quality of receiving water bodies in water transfers should not be restricted by the Water Transfers Rule.

In Part I, I will provide an explanation of the historical use of water transfers and their rise in importance. In Part II, I will further discuss water law evolution in reference to water transfers. Part III provides analysis of the proposed rule in light of prior case law precedent and evaluates its viability based on the plain meaning of applicable CWA provisions, statutory construction, and congressional intent. In the Conclusion, I will highlight potential legal challenges to the proposed rule and conclude that the proposed Water Transfers Rule is based on faulty rationale and ill advised.

I. WATER TRANSFERS AND THE QUANTITY VERSUS QUALITY DEBATE

Water law issues in the United States have traditionally been recognized as a western states’ issue, and have only fairly recently begun to influence eastern states. The concept of water transfers arose as a mechanism to utilize water for social benefit in the West, where water is both geographically and seasonally scarce.\textsuperscript{16} Not surprisingly, this concept flourished under the western water rights doctrine of prior appropriation, whereby water could be allocated for use without restriction to a specified geographic area, in contrast to the eastern riparian rights system tying water use to land adjacent to the water.\textsuperscript{17} Thus, although the idea of transferring water for use beyond riparian land is not a novel idea, the water transfers occurring in the United States have evolved into incredibly complex, massive hydrological undertakings. The following discussion employs the definition of water transfers offered by the EPA in its proposed Water Transfers Rule: “an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use.”\textsuperscript{18}

Water transfers in both western and eastern states continue to rise in practical and political importance as they promote efficient redistribution of water.\textsuperscript{19} “Water transfers increasingly are seen as an important management

\begin{itemize}
  \item \textsuperscript{13} Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 990 (D.C. Cir. 1997).
  \item \textsuperscript{14} Dubois v. U.S. Dep’t of Agric., 102 F.3d 1273, 1294 (1st Cir. 1996).
  \item \textsuperscript{15} United States v. Puerto Rico, 721 F.2d 832, 834 (1st Cir. 1983).
  \item \textsuperscript{17} For a comparative historical description of prior appropriation and riparian water rights schema, see JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW (2004).
  \item \textsuperscript{18} NPDES Water Transfers Proposed Rule, supra note 1 at 32,887.
  \item \textsuperscript{19} See COMMITTEE ON WESTERN WATER MANAGEMENT, supra note 16, at 16 ("[A]n era of reallocation . . . has begun . . . . An urbanized West demands water for new municipal and industrial uses as well as water to ensure environmental quality and recreational opportunities . . . . There is an increasing consensus in the western water community that new demands must be met primarily through the reallocation of existing supplies.").
\end{itemize}
option because they present opportunities to meet municipal and industrial demands, bolster environmental and recreational values, and shift water to new uses with minimal disruption to existing rights holders.\(^2\) In fact, there are currently thousands of water transfers occurring in the United States, reallocated for purposes such as water supply, irrigation, power generation, flood control, and environmental restoration.\(^2\)

These transfers raise concerns about the water quality impacts of mixing waters from diverse sources, but the regulatory landscape for water transfers is uncertain and fragmented. No comprehensive national policy on water transfers and their attendant water quality issues has been articulated. Some states have enacted "laws regulating water transfers which address water quantity and/or quality in either the donor or receiving waterbody or both" and some states have joined interstate water compacts that govern transfers.\(^2\)

Historically, however, the legal and policy issues surrounding such transfers have been quantity, not quality issues, and western, not eastern states' issues.\(^2\) The growing prominence of water transfer issues in the eastern states is symptomatic of the recent growth and development of eastern water law, evidenced by blossoming jurisprudence and academic commentary focusing largely on eastern states' water allocation.\(^4\) Moreover, it is only recently, with

20. Id. at 17.
22. EPA Agriculture—Office of Wastewater Management, supra note 21.
23. Examples of more traditional water transfer cases, generally western water quantity issues, include the Truckee Carson basins in Nevada, Colorado Front Range-Arkansas River Valley, Northern New Mexico, Yakima basin in Washington, Central Arizona, Central Valley of California, and Imperial Valley of California. For detailed descriptions and analysis of these projects see COMMITTEE ON WESTERN WATER MANAGEMENT, supra note 16, at 17. For summary descriptions see Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., No. 02-80309 Civ., 2006 WL 3635465, at *30 (S.D. Fla. Dec. 11, 2006) (specifically considering the impacts of its ruling on western water transfer projects including the Central Utah Project, the Colorado Big Thompson Project, and the Fryingpan-Aransas Project).
24. E.g., Thomas L. Sansonetti & Sylvia Quast, Not Just a Western Issue Anymore: Water Disputes in the Eastern United States, 34 CUMB. L. REV. 185 (2003-2004) (analogizing the factors motivating western water transfer projects and schema to current Eastern water problems, including litigation over Southeastern river basins in Georgia); see also Hope M. Babcock, Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water, Everywhere, Perhaps Some Drops for Us, 91 CORNELL L. REV. 1203 (2006) (arguing that eastern Indian tribes should be allowed to claim reserved tribal rights to water pursuant to the "Winters doctrine" thus far only applied in western states yet now necessitated by the increasing scarcity of and competition for water in the east). Beyond law review commentary, other indicia in the legal realm evidence this trend in the Eastern states. See, e.g., Alain C. Andry, IV, Applied Resource Economics and Policy Group Agricultural and Resource Economics, Water Law in North Carolina (1996), http://www.bae.ncsu.edu/programs/extension/publicat/arep/waterlaw.html (noting recent changes symptomatic of the overall evolution of Eastern water law: "In recent years, however, there has been increasing pressure on North Carolina’s water supplies. Growing urban areas need large amounts of water, agricultural irrigation has increased, industrial development creates new demands, and there is strong demand for recreational uses of water.").
the increasing societal valuation of environmental integrity, that the traditional normative focus on water quantity has diminished: in the last half-century, goals of water efficiency and equity have been tempered with concerns about environmental and third-party impacts.\textsuperscript{25} Increases in frequency of use and importance of water transfers have sparked discussion and action to mitigate or prevent adverse water transfer impacts.\textsuperscript{26} Categories of potential impacts include: environmental (water quality, instream flow, fish and wildlife, recreation, and wetlands); economic (revenues lost or gained); and social (municipalities, rural communities, agriculture, ethnic communities, and Indian tribes).\textsuperscript{27}

This broadening of policy considerations for water transfers has been reflected in the development of case law on the issue. The following Part analyzes case law both prior to and after Miccosukee and the Supreme Court's decision in Miccosukee, distilling how the case law informs an analysis of the proposed Water Transfers Rule. This discussion focuses on the plain meaning, statutory construction, and legislative history of the statutory provisions of the CWA implicated by the proposed rule, including indications of intent for cooperative federalism and concerns for mitigating water quality impacts. Through this survey of decisions on water transfers and the NPDES provisions in the CWA, tools of statutory construction are then used to examine the proposed rule and ultimately to suggest that the rule is ill advised.

II. LEGAL ANALYSIS OF WATER TRANSFERS: THE ROAD TO MICCOSUKEE

A. The Regulatory Framework of the CWA

The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."\textsuperscript{28} Elucidating this goal, the Supreme Court has explained, "[t]his objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation stated, 'the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained.'"\textsuperscript{29} More specifically, the Second Circuit notes that "although the Act contains the lofty goal of eliminating water pollutant discharges altogether, . . . the regulatory regime it creates requires principally that discharges be regulated by permit, not prohibited outright."\textsuperscript{30}

\textsuperscript{25} Accord COMMITTEE ON WESTERN WATER MANAGEMENT, supra note 16, at 3–4, 38–39.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 5.
\textsuperscript{28} 33 U.S.C. § 1251(a) (2006).
\textsuperscript{30} Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill I), 273 F.3d 481, 486 (2d Cir. 2001).
1. The National Pollutant Discharge Elimination System

The NPDES permitting system has been described as the “most important component of the Act.”\textsuperscript{31} The statutory structure, purpose, and operation of the NPDES evidences that

\[ \text{the NPDES program was created to accomplish the national goal that the discharge of pollutants into the navigable waters be eliminated. The CWA is aimed at achieving maximum "effluent limitations" on "point sources."} \]

. . . An NPDES permit serves to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger.\textsuperscript{32}

Effluent limitations, “restrictions on the quantities of pollutants that may be discharged,”\textsuperscript{33} provide the foundation for the NPDES permitting process to facilitate the critical goal of improving and protecting water quality.

Congress implemented the NPDES permitting program after recognizing the inherent difficulty in reaching the goal of discharge elimination. The CWA authorizes the EPA Administrator to “issue a permit for the discharge of any pollutant, or combination of pollutants.”\textsuperscript{34} States may also issue permits for stormwater discharges,\textsuperscript{35} point source discharges,\textsuperscript{36} and classes of discharges with authorization from the EPA.\textsuperscript{37}

Pursuant to the text of the CWA, the “discharge of any pollutant by any person” into navigable waters from any “point source” without an NPDES permit is prohibited by section 301 of the Act.\textsuperscript{38} The CWA defines “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.”\textsuperscript{39} The CWA defines a “point source,” in turn, as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged.”\textsuperscript{40}

Hence, the primary question in water transfer disputes centering on issues of water quality is “whether there is an ‘addition’ of pollutants to [the receiving

\textsuperscript{31} Dubois v. U.S. Dep’t of Agric., 102 F.3d 1273, 1294 (1st Cir. 1996); see also Catskill I, 273 F.3d at 485–86 ("The CWA’s primary function is to regulate the discharge of pollutants into navigable waters.").

\textsuperscript{32} Richard Konkoly-Thege, \textit{Addition of a Pollutant and Division of a Natural Body of Water: Should There be a New Math for NPDES Permits Under the Clean Water Act?}, 33 CAP. U. L. REV. 787, 802 (2005) (internal citations and quotations omitted).


\textsuperscript{34} 33 U.S.C. 1342(a) (2006).

\textsuperscript{35} Id. § 1342(p).

\textsuperscript{36} Id. § 1342(b) (allowing for states to issue permits in order to “insure compliance with, any applicable requirements of section[1] 1311”).

\textsuperscript{37} 40 C.F.R. § 122.28 (2007).

\textsuperscript{38} 33 U.S.C. § 1311(a)-(e).

\textsuperscript{39} Id. § 1362(12)(A). Also, the term “pollutant” is defined to include “dredged spoil, solid waste, . . . sewage, garbage . . .” Id. § 1362(6). “Navigable waters” are those “waters of the United States.” Id. § 1362(7).

\textsuperscript{40} Id. § 1362(14).
water] when water containing pollutants is discharged from [the source water]. Commentators often segment this inquiry into four factors, deciding whether the water transfer at issue causes (1) an "addition" (2) of a "pollutant" (3) to "navigable waters" (4) from any "point source." The factor of primary importance for water transfer case law and rule analysis, and concurrently the "most unclear and disputed element," is whether the transfers will be considered an "addition" in the context of the NPDES provision.

2. State Water Rights Provisions of the CWA

As with a number of other federal environmental laws, the Clean Water Act utilizes a cooperative federalism approach, requiring states to adopt water quality standards which protect against degradation of the physical, chemical, or biological attributes of the state's waters. In 1977 western states began expressing concern that federal water quality protection endeavors would lead to reductions in water diversions in the West. Such concerns prompted Senator Hart of Colorado and Senator Wallop of Wyoming to introduce CWA section 101(g) into the 1977 Amendments, whereby state authority over water management and allocation would be protected. Section 101(g) provides:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Chapter. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Section 101(g) reflects an attempt to preserve the states' historical power to decide issues of water quantity, and is cited by the EPA in support of the

41. Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1296 (1st Cir. 1996).
42. See, e.g., Cheri Y. Cornell, Note, The Clean Water Act: When Dumping Dead Fish is not the Discharge of a Pollutant, 64 WASH. L. REV. 913, 932 (1989); Alison M. Dornsife, Comment, From a Nonpollutant into a Pollutant: Revising EPA’s Interpretation of the Phrase “Discharge of any Pollutant” in the Context of NPDES Permits, 35 ENVTL. L. 175, 184 (2005). Other commentators and case law suggest that the term “from” is an independent variable for analysis. See Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 164–65 (D.C. Cir. 1982) (providing for a five-prong analysis wherein the term “from” was analyzed separately from the “point source” factor); Konkoly-Thege, supra note 32, at 802 (stating that the “from” factor is a focus of the author’s analysis of the applicability of NPDES permits to water transfers).
43. Dornsife, supra note 42, at 184.
46. Id.
47. 33 U.S.C. § 1251(g).
proposed rule to exclude water transfers from the NPDES permitting requirements.48

A final provision of the CWA, also relied upon heavily by the EPA as justification for the Water Transfers Rule, is section 304(f), the water management activities provision.49 Pursuant to section 304(f), the EPA must issue guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, as well as processes, procedures and methods to control pollution from, among other things, “changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.”50

This provision’s relationship with nonpoint source provisions and what the statutory language may demonstrate about congressional understanding of water movement and attendant pollution is discussed in Part III.

B. Introduction to the Proposed Rule

On June 7, 2006, the EPA issued the proposed Water Transfers Rule to clarify its interpretation that water transfers should be excluded from the NPDES permitting program under section 402 of the CWA.51 The proposed rule would apply to water transfers occurring between waters of the United States, including, according to the preamble, water movement through a dam.52 However, if pollutants are added by the water transfer activity itself, including oil or grease from pumps or hydrological facility equipment, such “additions” of pollutants would not be covered by the rule.53 In addition, the rule excludes water transfers “subjecting the water to an intervening industrial, municipal, or commercial use” from the NPDES exemption.54

As discussed in the Introduction, the proposed rule represents the EPA’s position on the applicability of the NPDES requirements to water transfers in response to the Supreme Court’s observation in Miccosukee that the EPA had not specifically adopted the government’s argument in an administrative document.55 According to the EPA, the rule is further necessitated by the

48. Id.
49. Id. § 1314(f).
51. NPDES Water Transfers Proposed Rule, supra note 1; see also EPA Agriculture—Office of Wastewater Management, supra note 21 (“This rulemaking would not apply to transfers in which the water is subject to an intervening industrial, municipal, or commercial use in the course of its transfer between the source and the receiving waterbody. This rulemaking applies only to transfers of waters of the U.S. Therefore, the withdrawal of groundwater is not included in the scope of this rule.”).
52. NPDES Water Transfers Proposed Rule, supra note 1, at 32,888.
53. Id.
54. Id. at 32,887.
55. Id. at 32,889 (citing S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 107 (2004)).
growing reliance on water transfers as solutions for municipal, agricultural, and commercial needs in the eastern United States, as well as transfers becoming increasingly commonplace and complex in the western states. The EPA’s primary argument in support of the proposed rule, articulated in an internal 2005 legal memorandum, is that the structure of the CWA indicates congressional intent for state and regional agencies to regulate water quantity issues like water transfers. The following discussion of the case law that preceded the EPA’s proposed Water Transfers Rule shows that these decisions have important implications for evaluating the Agency’s justifications for the rule as well as the efficacy of the rule itself.

C. Pre-Miccosukee Case law

The case law prior to Miccosukee consists of determinations as to whether specific dams, hydropower facilities, and water transfers constitute discharges or additions of pollutants that are subject to the NPDES permitting requirement. The older line of cases, including National Wildlife Federation v. Gorsuch and National Wildlife Federation v. Consumers Power Company—often referred to as the “dam(s) cases”—hold that dams and hydropower facilities are not required to obtain NPDES permits, because such operations do not “add” pollutants. In a more recent set of decisions—the “pumping cases”—the First and Second Circuits have found that the diversion of pollutant-containing reservoir water through a tunnel and into creeks that would not naturally be connected to the reservoir, constitutes “an ‘addition’ of a ‘pollutant’ from a ‘point source.’”

1. The “Dam Cases”

In Gorsuch and Consumers Power, the D.C. and Sixth Circuits determined that when water is moved “within one singular body of water,” “dams and dam-induced water quality changes are exempt from NPDES permits.” As the Second Circuit summarized in a subsequent decision, “[t]he EPA’s position, upheld by the Gorsuch and Consumers Power courts, is that for there to be an ‘addition,’ a ‘point source must introduce the pollutant into navigable water from the outside world.”
In *Gorsuch*, the National Wildlife Federation brought suit against the EPA Administrator alleging a failure to regulate, pursuant to a nondiscretionary duty, discharge of pollutants from dams. The EPA had exempted dams and hydropower facilities from NPDES permitting requirements under the theory that such facilities do not “add” pollutants, but rather redistribute them in the same body of water. The EPA argued that, excepting any oil and grease pollution discharged downstream from dam machinery, the facilities at issue did not introduce a pollutant into the navigable waters from the outside world.

The D.C. Circuit agreed with the EPA, holding that where a dam contains water in a reservoir, discharging water to a river is not a point source discharge under the CWA, and does not require an NPDES permit. The court determined that Congress had not specifically addressed whether dams were subject to NPDES permitting requirements and thus upheld as reasonable the EPA’s interpretation of the NPDES provision’s nonapplicability to dams.

In *Consumers Power*, the Sixth Circuit issued a similar holding: a hydroelectric dam operating on Lake Michigan, which pumped water to a reservoir and then released it back into Lake Michigan, did not constitute an “addition” of a pollutant from a point source and did not require an NPDES permit. In its analysis, the Sixth Circuit examined whether the “pollutant,”—the fish from Lake Michigan that were pureed in the hydroelectric generators and then discharged back into the lake—was introduced from the “outside world.” As in *Gorsuch*, the court gave deference to the EPA’s construction of the term “added” and the position that an NPDES permit was not required for the addition of the dead fish by the hydropower facility.

The court reasoned that the fish existed on both sides of the dam and the water was essentially moving from one location to another within the same water body, precluding a finding that there was an “addition,” because no pollutants were introduced from the outside world.

The EPA relied on these decisions as substantial justification for the proposed Water Transfers Rule. The EPA specifically cited case law that determined Congress intended some water diversions to be excluded from the

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63. *Gorsuch*, 693 F.2d at 161, 165.
64. *Id.* at 161.
65. *Id.* at 165; see also Memorandum from Ann R. Klee & Benjamin H. Grumbles, *supra* note 3, at 10 (noting that the water quality changes caused by dams included “low dissolved oxygen, dissolved minerals and nutrients, sediment, temperature changes and supersaturation”).
67. *Id.*
69. *Id.* at 584.
70. *Consumers Power*, 862 F.2d at 585.
71. Memorandum from Ann R. Klee & Benjamin H. Grumbles, *supra* note 3, at 11 (using the *Gorsuch* court’s dicta regarding Congressional “intent to minimize federal control over state decisions on water quantity,” 693 F.2d at 179, as justification for the Water Transfers Rule).
NPDES program. Furthermore, the EPA concluded from these cases that the courts “examined the CWA as a whole and concluded that it was more consistent with the overall statutory scheme to subject water flow diversions to State nonpoint planning processes rather than the NPDES program.”

2. The “Pumping Cases”

The “pumping cases” address the applicability of CWA section 301(a)’s permit requirements in situations where water is pumped from a source, polluted, and then discharged back into the source water or another water body. In these decisions, courts have come to opposite conclusions from those reached in the “dam cases.”

In Dubois v. United States Department of Agriculture, the First Circuit analyzed whether “the Forest Service violated Section 301(a) by failing to obtain an NPDES permit before approving” a ski resort’s plan to draw down water from a pristine pond and nearby rivers “to pressurize and prevent freezing in its snowmaking equipment,” and subsequently discharge the polluted “used water” into the pristine pond. The Dubois court held that an “addition” of pollutants had occurred when the used water was discharged back into Loon Pond because the used water contained pollutants that would not enter Loon Pond but for the water being released from the snowmaking equipment.

In so holding, the Court of Appeals specifically rejected the “unitary waters” argument, under which the district court had found that the water from the intake river and the receiving water were “all part of a singular entity, the waters of the United States.” Overruling this determination, the Dubois court went so far as to describe the “unitary waters” theory as having “no basis in law or fact.” The court found it determinative that the transfer between the two water bodies would not occur naturally, leading the court to analogize such a situation to one wherein “water is added from an external source to the pond and an NPDES permit is required.”

In 2001, a factually similar case came before the Second Circuit. In Catskill Mountains Chapter for Trout Unlimited, Inc. v. City of New York (Catskill I), the court examined the historical withdrawals from the Schoharie Reservoir, which were then passed through the Shandaken Tunnel into Esopus.
Creek, and ultimately used to supply New York City with drinking water. The tunnel discharged "pollutants in the form of suspended solids, turbidity, and heat into Esopus Creek. The pollutants, which are a result of erosion within the source watershed, violate[d] state water quality standards for turbidity and temperature in the receiving waters."  

The Second Circuit held that such a diversion constituted a "discharge of a pollutant" under the CWA, violating the prohibition on discharges of pollutants without an NPDES permit. The court overturned the district court, which had been unpersuaded by the fact that the water from the reservoir would not naturally reach the creek and had held that the water transfer was not an "addition" under the CWA. In a highly factual examination, the Court of Appeals determined that the water transfer from the reservoir, through the tunnels, and finally to the creek, constituted an "addition" to the creek and that such a discharge required an NPDES permit. Similar to the rationale provided in Dubois, the Second Circuit also rejected the unitary waters argument because the water had been extensively and artificially "diverted from its natural course" and could not be considered the same as the water in the original water body. The court explained that the reservoir and pristine creek "are hydrologically connected only insofar as both are tributaries of the Hudson" and that "under natural conditions, water from the... Reservoir would never reach [the] Creek." The case was remanded to the district court, which assigned millions of dollars in civil penalties to the City of New York.  

In Northern Plains Resource Council v. Fidelity Exploration and Development Co.—a 2003 Ninth Circuit case, and the final "pumping case" examined here—the Northern Plains Resource Council (Council) filed a citizen suit under the CWA to challenge the groundwater pollution that had occurred as a result of discharges from the coal bed methane extraction processes used by Fidelity Exploration. Fidelity extracted the methane gas from deep within

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79. 273 F.3d 481 (2d Cir. 2001).
80. Nichols, supra note 45, at 119, 123 (examining the Catskill I and II cases in the context of discussing litigation over whether water transfers are "point source discharges under the federal Clean Water Act and subject to [NPDES] permitting requirements").
81. Catskill I, 273 F.3d at 494.
82. Id. at 485.
83. Id. at 489–92.
84. Id. at 492.
85. Id. at 484.
86. See id. at 494; see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 244 F. Supp. 2d 41, 57 (N.D.N.Y. 2003), aff'd, 451 F.3d 77 (2d Cir. 2006).
87. 325 F.3d 1155 (9th Cir. 2003). Although this case is not typically labeled a "pumping case"—it examines whether or not a mining extraction process adds pollutants to navigable waters for the purposes of the CWA and focuses on the definition of "pollutant" rather than the word "addition"—the case nevertheless contains language related to the present inquiry.
the Powder River Basin, eventually pumping groundwater to the surface and discharging it into the Tongue River.\(^8\) The water discharged into the Tongue River was more saline and contained several pollutants regulated by the EPA.\(^9\)

The decision’s most powerful statement, perhaps, concerns the authority of the EPA to approve Montana’s permitting program, where a Montana state law exempted such groundwater discharges from the NPDES permitting requirement.\(^9\) Contrary to the EPA’s assertion in its rationale for the proposed Water Transfers Rule, the Ninth Circuit found that the “EPA does not have the authority to exempt discharges otherwise subject to the CWA. Only Congress may amend the CWA to create exemptions from regulation.”\(^9\) The Ninth Circuit also rejected the mining company’s argument that “discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another.”\(^9\) Finally, *Northern Plains* crystallized the importance of the impact on receiving waters. The Ninth Circuit not only found that protection of the receiving waters is the “goal of the CWA,” but also that a reading of the statute that does not result in protecting receiving waters from quality-altering discharges would be “illogical.”\(^9\) Such observations and emphasis on the impact of the receiving water undercut the EPA’s “unitary waters” rationale in the proposed rule.

**D. South Florida Water Management District v. Miccosukee Tribe of Indians**

In *Miccosukee*,\(^9\) the Supreme Court considered the question of whether the interbasin pumping of polluted flood waters (a process which does not itself generate pollutants) in the Florida Everglades from a drainage canal to a water impoundment constitutes an “addition” of a pollutant “from” a point source under the CWA.\(^9\) The Court held only that “the definition of ‘discharge of a pollutant’ contained in §1362(12) . . . includes within its reach point sources that do not themselves generate pollutants.”\(^9\) On the larger question of whether

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\(^8\) *Id.* at 1157.
\(^9\) *Id.*.
interbasin water transfers require an NPDES permit, the Court avoided a decision on the merits.

1. Background and the Lower Court Decisions

The factual background of the Miccosukee case illustrates our nation’s fragmented authority over environmental decisionmaking on federal, state, and local levels, and the deleterious consequences of such fragmentation. Over time, a multitude of federal agencies, municipal regulatory entities, and the Florida State Legislature have sparred over control, use, and preservation of the Everglades and over the best policies for improvement and protection of this natural resource.

Beginning in the early 1900s, the U.S. Army Corps of Engineers and the predecessors to the South Florida Water Management District (District) constructed a system of water control and diversion facilities, canals, and levees. The scale of the project, including flood control mechanisms, is massive. Currently there are more canals and dykes “than in the whole of Holland,” channeling “1.7 billion gallons of water a day out” of the Everglades. Beyond altering the water flow from Lake Okeechobee to the Everglades, with “1,400 miles of canals, levees and dikes, 125 water control

97. See Richard J. Lazarus, Human Nature, the Laws of Nature, and the Nature of Environmental Law, 24 VA. ENVTL. L.J. 231, 241–42 (2005) (describing the structure of our national environmental lawmaking institutions as fragmented both horizontally between the branches of government and vertically between federal, state, tribal, and local governments). Professor Lazarus delineates this splintered authority to illustrate the difficulties in environmental lawmaking, asserting that varied authorities “approach issues from very different policy perspectives related to their competing, and sometimes opposing, missions.” Id. at 241. The Everglades are paradigmatic; myriad federal agencies, state, tribal, and local decisionmakers share fractured control of this natural resource. Authority over the Everglades is fragmented both horizontally and vertically, with each agency or policymaker approaching the ecosystem from at best, different, and at worst, competing policy perspectives. See, e.g., Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., No. 02-80309 Civ., 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006). In Friends of the Everglades the court notes that, “in operating the [pump stations in the Everglades], there is a tremendous amount of coordination between the Corps and the SFWMD.” Id. at *7. The court also lists policies undertaken to restore the Everglades by both the Florida legislature, such as the Surface Water and Improvement Act, and by Congress, such as the Comprehensive Everglades Restoration Project. Id. at *23–24, *27.

98. See, e.g., FLA. CONST. art. II, § 7b (“Those in the Everglades Agricultural Area who cause water pollution within the Everglades Protection Area or the Everglades Agricultural Area shall be primarily responsible for paying the costs of the abatement of that pollution.”).

99. For a history of the Everglades and a description of its complex and precious ecosystem, see Konkoly-Thege, supra note 32, at 787–94 (describing the geomorphic history, ecological value and the current threats to the Everglades from overdevelopment).

structures, and 18 pumping stations, the development also caused adverse increases in the phosphorus levels in the Everglades.

In an attempt to stem the flow of waters laden with phosphorus and other pollutants, the Miccosukee Tribe of Indians (Tribe) and the Friends of the Everglades filed for injunctive relief against the District, seeking to enjoin the pumping of water across a levee without a NPDES permit. Specifically, the Tribe claimed that the District’s pumping of water containing urban and agricultural stormwater runoff through the C-11 canal and the S-9 pump into a water conservation area (WCA) constituted a “discharge” from a point source. The district court granted the Tribe summary judgment, holding that the C-11 canal and the WCA-3 bodies of water were separate and that “but for” the S-9 pump, the polluted water would not have flowed into the water conservation area. The Eleventh Circuit affirmed, holding “that an ‘addition’ occurs ‘from’ a point source any time the point source causes navigable water containing pollutants to flow into another body of navigable water into which it would not otherwise have flowed, ‘but for’ operation of the point source,” and that a permit was required for operation of the S-9 pump.

102. Id. at 139. For an in-depth treatment of the causes, effects, and potential solutions to the environmental problems in the Everglades see KLEIN ET AL., supra note 100, at 104. Other impacts discussed include a 70 percent drop in historic water flows into the Everglades and a 90 percent drop in populations of wading birds. Furthermore, 68 percent of plant and animal species in the Everglades are classified as threatened or endangered. Id.
103. The Miccosukee Tribe of Indians of Florida is a federally recognized Indian tribe whose members have lived and worked in the Everglades for generations. The Miccosukee possess land interests . . . within the Everglades, including a perpetual lease to most of [WCA-3A] and their continued existence is intricately tied to a healthy Everglades ecosystem. The Friends of the Everglades is a Florida, nonprofit grassroots organization dedicated to protecting and restoring the Everglades. Originally founded by Marjory Stoneman Douglas in 1969 in order to stop the building of a jetport in the Everglades, the Friends of the Everglades has expanded to a membership of over 6,000 members, all of whom are dedicated to the protection and preservation of the Florida Everglades.

Konkoly-Thege, supra note 32, at 793–94 (internal quotations omitted).
105. Id.
108. Miccosukee, 280 F.3d at 1371.
2. The Supreme Court Decision

In 2004, the Supreme Court found, in its *Miccosukee* decision, that the "definition [of a 'point source'] makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.'" Ultimately, the Court agreed that if the waters are part of the same, indistinguishable body of water, an NPDES permit would not be required. Commentators note that this statement indicates the Court's acceptance of the unitary waters argument that a permit would be unnecessary for pollutants moving within one body of water. In addition, the Court clarified that "the Government's broader 'unitary waters' argument is open to the District on remand." Because the question of whether the water in the C-9 canal and the WCA are "meaningfully distinct" bodies of water involved a "genuine issue of material fact," the Supreme Court remanded this issue to the district court. The case has been stayed, pending the Eleventh Circuit resolution of *Friends of the Everglades, Inc. v. South Florida Water Management District*, described below.

Beyond this narrow holding, the Supreme Court elucidated its views on state water rights and the "unitary waters" theory advocated by the Solicitor General in dicta, both of which are applicable to the proposed Water Transfers Rule.

a. Dicta on the Unitary Waters Theory, States Rights, and Water Allocation

Justice O'Connor's dicta on the unitary waters theory may reveal the Court's views on the validity of the "dams cases" so heavily relied upon by the EPA in its Rule justification. The Solicitor General, as amicus curiae, summarized the unitary waters theory for the federal government: "the waters of the United States' should be viewed as a whole for purposes of NPDES

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109. *Miccosukee*, 541 U.S. at 105. Justice Scalia wrote a partial concurrence stating that he would have affirmed the lower court opinions without reaching the merits of other issues. *Id.* at 112 (Scalia, J., concurring in part, dissenting in part).

110. *Id.* at 112 (majority opinion).

111. E.g., Sara J. Russell, *U.S. Supreme Court Remands Miccosukee for a Determination of Whether There Are Two Bodies of Water or One*, 7 NO. 3 A.B.A. WATER RESOURCES COMM. NEWSL. 6, 8–9 (2004).

112. *Miccosukee*, 541 U.S. at 112.

113. *Id.* at 111–12 (noting that the Court did “not decide . . . whether the District Court’s test is adequate for determining whether C-11 and WCA-3 are distinct” and holding “only that the District Court applied its test prematurely”). Further, the Court described the canal and pumping system as “artificial[ly] . . . separat[ing] the C-11 basin from WCA-3” and intimated that “absent human intervention” the water in the conservation area would join with water in the canal. *Id.* at 100–01.


permitting requirements. Once a pollutant is present in one part of ‘the waters of the United States,’ its simple conveyance to a different part is not a ‘discharge of a pollutant’ within the meaning of the Act.”116 This understanding of the hydrological connectedness of water bodies involved with a transfer would preclude a finding that there is an “addition” of a pollutant in this movement of water.

The Court, in its discussion of the merits of the unitary waters theory and state water rights, illustrated the major criticisms of the proposed Water Transfers Rule. Perhaps most applicable to the examination of the rule is the Court’s discussion of the federal government’s position in Miccosukee. The government argued that Congress intended potential pollution from the type of discharges at issue to be regulated under local nonpoint source pollution programs.117 Contrary to the government’s reading, the Court found that section 304(f)(2)(F) of the CWA, a nonpoint source pollution control and identification provision, “does not explicitly exempt nonpoint pollution sources from the NPDES program if they also fall within the ‘point source’ definition.”118 Examining section 303(c)(2)(A), a water quality standards provision, the Court further stated that the unitary waters theory may run contrary to the “individual water bodies” protection approach utilized by the Clean Water Act.119 Finally, examining the Act’s relevant provisions, the Court suggested that already the “NPDES program . . . appears to address the movement of pollutants among water bodies, at least at times.”120 Such regulations allow industrial dischargers an “intake credit” for withdrawing waters with pollutants if the “discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made.”121

However, Justice O’Connor’s opinion also contained commentary that may support the position articulated by the federal government and asserted by the EPA in its rationale for the proposed Water Transfers Rule. For example, the government and several western states amici raised the argument that imposing an NPDES permit requirement for water transfers would result in

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117. Miccosukee, 541 U.S. at 106.
118. Id. at 106 (citing 33 U.S.C. § 1314(f)(2)(F)).
119. Id. (citing 33 U.S.C. § 1313(c)(2)(A)) (“For example, under the Act, a State may set individualized ambient water quality standards by taking into consideration ‘the designated uses of the navigable waters involved.’ Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit holders who discharge to the water body. This approach suggests that the Act protects individual water bodies as well as the ‘waters of the United States’ as a whole.” (internal citations omitted)).
120. Id. at 108.
121. 40 C.F.R. § 122.45(g)(4) (2007).
severe administrative burdens. Justice O'Connor noted the potential consequences, described by the amici, of construing the statutory language to require NPDES permits for all types of water transfers: "[T]housands of new permits might have to be issued. . . . Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively". This "practical consequences" argument thus appeared to influence the Court's opinion and perhaps will resonate in the future with jurists choosing to engage in this type of cost-benefit analysis.

Yet, the Court was not without answer to these practical concerns. The Court indicated that such costs may be "necessary to protect water quality" and that the administrative burden and costs for the EPA and states could be reduced through the creation of "general permits to point sources associated with water distribution programs." Thus, while the Supreme Court highlighted the primary arguments within the debate over the applicability of NPDES permit requirements to water transfers, it offered little definitive guidance for the EPA's subsequent rulemaking. The Court did note, however, that a permit would not be required for transfers between waters that are part of an indistinguishable body of water, partially adopting the rationale of the "dam cases" detailed above. But the Court ultimately examined state water rights issues and the government's "unitary waters" theory only in dicta.

E. Postscript: Case law Following the Miccosukee Decision

1. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill II)

After the Supreme Court decision in Miccosukee, on August 5, 2005, the EPA produced a memorandum providing the Agency's interpretation of the applicability of section 402 to water transfers, which included its rationale for concluding that water transfers did not require permits. The Agency subsequently published the NPDES Water Transfers Proposed Rule for comment in the Federal Register on June 7, 2006. Also since Miccosukee, two courts have directly addressed the applicability of NPDES permitting

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123. Id.; see also Russell, supra note 111, at 9 (explaining that the District and the United States argued that "federal control over states' water facilities runs counter to the state sovereignty exemption created by Congress in § 101(g)/ 33 USC § 1251(g)").
124. Miccosukee, 541 U.S. at 108.
125. Id. (citing 40 C.F.R. §§ 122.28, 123.25 (2007)).
126. Id. at 112.
128. NPDES Water Transfers Proposed Rule, supra note 1.
requirements to water transfers. The first case arose in the Second Circuit, an 
appeal in the *Catskill Mountains Chapter of Trout Unlimited* case (*Catskill I*).\textsuperscript{129} Following the district court’s assessment of the civil penalties for the 
*Catskill I* case at $25,000 per day of violation, New York City appealed the 
penalties. Picking up where the federal government left off in *Miccosukee*, New 
York City argued that the “waters of the United States” should be viewed as 
unitary for NPDES permitting requirements.\textsuperscript{130} Western states filed briefs as 
amici, arguing that CWA section 101(g) protects diversions pursuant to state 
water rights from NPDES permitting.\textsuperscript{131}

In an opinion directly addressing the legal persuasiveness of the EPA’s 
2005 legal memorandum detailing the rationale for the Water Transfers 
Rule,\textsuperscript{132} the Second Circuit rejected the EPA’s interpretation, and held once 
again that New York City must obtain an NPDES permit to transfer water with 
high turbidity from a water management tunnel into a trout stream.\textsuperscript{133} The 
Second Circuit stated that the “power of the states to allocate quantities of 
water within their borders is not inconsistent with federal regulations of water 
quality.”\textsuperscript{134} This conclusion undercuts the EPA’s claim, as discussed below, 
that states must have sole authority over water transfers because of their 
traditional control over water quantity issues. The Second Circuit concluded 
instead that state allocative authority over water quantity may not come at the 
expense of federal water quality protections.

2. **Friends of the Everglades, Inc. v. South Florida Water Management District**

On December 11, 2006, the Southern District of Florida decided a case 
that is factually quite similar to *Miccosukee* and issued a ruling that supports a 
NPDES permit requirement for water transfers at issue in the EPA’s proposed 
rule. *Friends of the Everglades, Inc. v. South Florida Water Management District* asked whether the Water Management District’s pumping of water into 
Lake Okeechobee constituted the discharge of a pollutant, requiring an NPDES 
permit.\textsuperscript{135}

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\textsuperscript{129} *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill I)*, 451 F.3d 77 (2d Cir. 2006). The City of New York filed a petition for certiorari with the Supreme Court in the *Catskill II* case, which was denied.

\textsuperscript{130} *Id.* at 81.

\textsuperscript{131} *Id.* at 83. Briefs filed by Colorado, Idaho, Nebraska, New Mexico, North Dakota, and Utah argued that the previous *Catskill I* ruling would “upend state regulation of water rights.” *Id.; see also Nichols, supra* note 45, at 123.

\textsuperscript{132} Because the EPA position on water transfers and NPDES permits was articulated only in a policy memorandum, the court found, and New York City conceded, that it was not entitled to heightened *Chevron* deference. Instead, the court judged the interpretation by its “power to persuade” according to *United States v. Mead Corp. (Catskill II)*, 451 F.3d at 82 (citing *Mead*, 533 U.S. 218, 235 (2001)). Although the Second Circuit was clearly not persuaded by the EPA in *Catskill II*, following the promulgation of the Water Transfers Rule, the EPA’s interpretation of the CWA will certainly be entitled to heightened deference, and any court’s analysis will change therewith. *Id.* at 86–86.

\textsuperscript{133} *Id.* at 86.

\textsuperscript{134} *Id.* at 84.
permit. Mirroring its defense in *Miccosukee*, the district argued that its transportation of polluted water between two water bodies did not actually add pollutants to the receiving body.

The district court began its opinion with an intricate analysis of the hydrology of Lake Okeechobee and the surrounding area, examining the natural water flow, current water flow, surface and subsurface flow, the pumping and back-pumping of water into Okeechobee, and its affects on water quality and biology. In essence, *Friends of the Everglades* demonstrated that a district court did indeed have the tools to engage in the “meaningfully distinct” examination the EPA eschewed in its proposed Rule. Drawing on the “meaningfully distinct” indications from the Supreme Court opinion in *Miccosukee* and the considerations delineated in *Catskill II*, the court found the lake and the canals to be “meaningfully distinct.” Although the court declined to create a specific test, it noted that “at a minimum, the evidence must demonstrate that the pollutants would not have reached the Lake were it not for backpumping, and that the Lake and canals... would remain distinct if backpumping ceased.”

In addition, while the court took note of the far-reaching implications of its decision, it espoused a textual approach to the statutory interpretation issue, stating that the “initial legal question before the Court rests primarily upon the proper interpretation of a few words of the CWA”: namely the phrase “discharge of a pollutant,” defined as “any addition of any pollutant to...
navigable waters from any point source."\(^{140}\) The District and the EPA again proffered the "holistic approach" to statutory interpretation, and while the court acknowledged the merits of that argument, it emphasized that "even when taking a 'holistic approach,' a court must begin its analysis with the language of the statute."\(^{141}\) Beyond the text of the statute, the court found the statutory structure argument posited by the EPA equally unavailing. The court disagreed with the argument that the structure of the CWA demonstrated the primacy of state authority in water quantity issues at the expense of water quality: "[f]ar from being inconsistent with the ‘structure’ of the CWA, requiring permits for backpumping is consistent with the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters."\(^{142}\)

Ultimately the *Friends of the Everglades* court found the statutory text of the CWA to be unambiguous and did not reach the question of how much deference it would accord to the EPA’s proposed Water Transfers Rule under a "Chevron step two" analysis.\(^{143}\) Considering the balance the CWA strikes between water allocation goals and protection of water quality, the court held that "water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the NPDES permitting program."\(^{144}\)

### III. ANALYSIS OF THE PROPOSED NPDES WATER TRANSFERS RULE

The proposed Water Transfers Rule exempts most water transfers from the class of discharges requiring a permit under the NPDES provision of the CWA. The EPA bases the exemption on the assertion that the movement of water during a transfer does not constitute an “addition” of a pollutant under the CWA, even when the source water contains pollutants not found in the receiving water.

#### A. An Analysis of the Proposed Rule: Plain Meaning, Statutory Construction, and Congressional Intent

In August 2005, the EPA issued an interpretive memorandum addressing "whether the movement of pollutants from one water of the United States to another by a water transfer is the ‘addition’ of a pollutant potentially subjecting the activity to the permitting requirement under section 402 of the Act."\(^{145}\) The legal memorandum provides the official rationale for the proposed rule.\(^{146}\) The
Agency has summarized its rationale as follows: “Based on the statute as a whole and consistent with the Agency’s longstanding practice, the interpretive memorandum concluded that Congress intended for water transfers to be subject to oversight by water resources management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA.”

The following subpart analyzes the rationale provided for this rule by examining the plain meaning, statutory construction, and legislative history of the relevant provisions of the Clean Water Act. To provide context for this analysis, prior case law is used to evaluate the rationale provided by the 2005 memorandum and the Federal Register Proposed Rule announcement.


The Supreme Court has made clear that interpretation of a statutory provision or term begins with the plain meaning of the text: “[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” The proposed Water Transfers Rule reflects the EPA’s interpretation of the text of the NPDES provision of the CWA and associated definitions. As noted above, the phrase “discharge of a pollutant” is defined in the CWA as “any addition of any pollutant to navigable waters from any point source.” The Act further defines each relevant term within this statutory provision, except for “addition.” The ordinary meaning of “addition”—“the act or process of adding . . . [or] something added”—is unavoidable and injurious to the EPA’s position in the Water Transfers Rule that a transfer from one navigable water into another would not constitute an “addition,” even when the source water contains pollutants the receiving water does not. Consequently, some courts examining this language have concluded that “it is evident that ‘addition... to the waters of the United States’ contemplates an addition from anywhere outside of the receiving water, including from another body of water.” Given the current Supreme Court’s

147. Id.
150. Id. § 1362(6), (7), (14).
152. See Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., No. 02-80309 Civ., 2006 WL 3635465, at *48 (S.D. Fla. Dec. 11, 2006) (“‘Addition’ is defined as the ‘joining of one thing to another.’” (citing WEBSTER’S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 24 (1993))).
153. Id. at *42 (quoting Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1368 (11th Cir. 2002), vacated sub nom. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004)); see also id. (“in determining whether pollutants are added to navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water” (quoting Miccosukee, 280 F.3d at 1368)); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of
preference for plain meaning, and even dictionary definitions, it will likely be extremely difficult to overcome this ordinary meaning interpretation of "addition." 154

Further, the liberal use of the word "any" as a modifier before the words "addition," "pollutant," and "point source" supports the conclusion that such words, including "addition" are meant to be construed broadly. 155 The Supreme Court noted in Department of Housing and Urban Development v. Rucker that "the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" 156 Congress selected the word "any" to modify "addition" in the NPDES CWA provision. The EPA's position that "addition" may only cover pollutants introduced from the outside world into a water body, arguably subverts this congressional intent, and "would relegate the word 'any' to an insignificant role." 157 Indeed, as stated succinctly by the D.C. Circuit in 2006, "[i]n this context, there is no reason the usual tools of statutory construction should not apply and hence no reason why 'any' should not mean 'any.'" 158

To circumvent this textual trouble, the EPA argues that the "overall structure of the CWA is more important than specific language for determining its application to water transfers." 159 Yet both current and older water transfer case law further strengthens the plain meaning argument. For example, in Catskill I, the Second Circuit plainly held that New York City's movement of polluted water through a tunnel into a trout stream "qualifies as an 'addition'" New York (Catskill II), 451 F.3d 77, 84 (2d Cir. 2006) (finding that defendants' arguments "simply overlook [the CWA's] plain language").

154. The use of this textualist approach for defining statutory terms increased markedly in the last fifteen years, attributed primarily to Justices Scalia and Thomas. In the 1960s, only sixteen Supreme Court opinions cited dictionaries, whereas in the 1990s, two hundred opinions referenced dictionaries to define terms. See, e.g., John Hasko, Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions, 94 LAW LIBR. J. 427, 432 (2002); Roy Mersky, The Evolution and Impact of Legal Dictionaries, 15 EXPERIENCE 32, 32 (Fall 2004); see also Jason Weinstein, Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism, 38 U. MICH. J.L. REFORM 649, 652-53 (2005).

155. See New York v. EPA, 443 F.3d 880, 890 (D.C. Cir. 2006) (holding that the use of the word "any" before "modification" "means that all types of 'physical changes' are covered" under the New Source Review Program in the Clean Air Act). The D.C. Circuit also noted that the role of the judiciary is to construe a term consistent with its customary effect, unless "the question of statutory interpretation ... arise[s] in a setting in which the Supreme Court has required heightened standards of clarity to avoid upsetting fundamental policies." Id. at 885.

156. 535 U.S. 125, 131 (2002) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)). The D.C. Circuit in New York v. EPA also summarized the Supreme Court jurisprudence related to construction of the term "any": "In a series of cases, the Supreme Court has drawn upon the word 'any' to give the word it modifies an 'expansive meaning' when there is 'no reason to contravene the clause's obvious meaning.'" New York v. EPA, 443 F.3d at 886 (citing Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 31-32 (2004) and Gonzales, 520 U.S. at 5).


158. Id. at 886.

under the plain meaning of that word." The court explained that "[g]iven the ordinary meaning of the CWA's text . . . we cannot accept the Gorsuch and Consumers Power courts' understanding of 'addition,' at least insofar as it implies acceptance of . . . a 'singular entity' theory . . . . Such an interpretation is inconsistent with the ordinary meaning of the word 'addition.'" The court added that it would not be "sway[ed] . . . from what we find to be the plain meaning of [the CWA's] text" by consideration of any of the statute's purposes. Furthermore, the Second Circuit, in Catskill II, found the ordinary meaning of the statute's text so clear that it refused to consider the EPA's alternative structural argument: "these 'holistic' arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language."

Indeed, it is likely that a court's interpretation of the CWA will begin and end with the statutory text, thus rendering the EPA's structural argument nugatory. But even if a court were to reach the Agency's holistic approach to the statutory scheme, serious obstacles would still remain for the EPA.

2. The Statutory Structure of the Clean Water Act—A Holistic Approach to Interpretation

The EPA has construed the term "addition" by taking a "holistic" approach to the statute and reading the term in the context of the entire statute, rather than focusing on its plain meaning within a specific provision. Such interpretive strategies have been generally accepted by the Supreme Court. In 2006, for example, the Court found that:

The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, [and] considering the purpose and context of the statute . . . .

The EPA's most persuasive argument in support of the proposed Water Transfers Rule is that a "holistic" approach to the CWA supports the narrow interpretation of "addition."

The EPA applied this "holistic" approach by highlighting a perceived structural discord between the water quality provisions and the state water management provisions of the CWA. The Agency pointed out that multiple sections of the CWA provide states the primary responsibility for management

161. Id. at 493.
162. Id. at 494.
163. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill II), 451 F.3d 77, 84 (2d Cir. 2006).
164. Id.
of water resources because many states had pre-CWA programs concerning water quantity, and Congress was aware of the balance of authority between these state and federal programs. The EPA argued that given the imposition a federal NPDES permitting scheme for water transfers would cause for state authority over water allocation and management, Congress could neither have intended to create such interference, nor intended to create federal oversight of water transfers under the NPDES provisions of the CWA.

Of particular importance to the EPA was maintaining state authority over "water resource management," pursuant to sections 304(f) and 101(g) of the CWA. Section 304(f) governs water management activities: the control, movement, and diversion of water for various purposes. This provision focuses on controlling water pollution outside the scope of the NPDES permitting scheme, and specifically discusses potential changes in the movement, flow, or circulation of navigable waters or flow diversions, and applies to today's water transfers. The EPA argued that "[w]hile section 304(f) does not exclusively address nonpoint sources of pollution, it nonetheless concerns nonpoint sources and reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program." Senator Wallop, who proposed section 101(g), the 1977 amendment designed to preserve state authority over water management and allocation, commented on the section's purpose and operation with respect to the NPDES permitting provisions. His comments bolster the EPA's argument to the extent that application of the NPDES permit process would have a nonincidental effect on individual water rights:

The requirements of section 402 and 404 permits may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

This amendment is an attempt to recognize the historic allocation rights contained in State constitutions.

It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the act was designed.

166. Memorandum from Ann R. Klee & Benjamin H. Grumbles, supra note 3, at 5.
167. Id. at 8.
169. Memorandum from Ann R. Klee & Benjamin H. Grumbles, supra note 3, at 6–7 (internal quotations omitted).
In its 2005 memorandum about the applicability of NPDES permitting requirements to water transfers, the EPA emphasized these provisions as illustrative of legislative intent that water transfers be regulated by water resource management agencies and state non-NPDES authorities. 171

However, commentators have expressed doubt that the structural interpretation of the Act as espoused by the EPA would be upheld by courts because of its potential inconsistencies with prior case law utilizing a more textual interpretation, as illustrated in the Miccosukee decision. 172 While the federal government’s argument may be persuasive to those jurists embracing federalism norms, a 2004 Supreme Court decision may impose a barrier to this rationale. In PUD No. 1 of Jefferson County v. Washington Department of Ecology, the Supreme Court examined the intersection of the state water rights and water quality provisions in the CWA, concluding that “[s]ections 101(g) and 510(2) [state authority provision] preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.” 173 The Ninth Circuit, in United States v. Akers, has also examined the delineation of this authority, finding a similar result: “A fair reading of the statute as a whole makes clear that, where both the state’s interest in allocating water and the federal government’s interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process.” 174 In Akers, the court upheld a U.S. injunction against a farmer who dredged and filled his wetlands, demonstrating that the state permit process balances the utility of these projects with the water quality considerations required by the federal permitting process. 175

Hence it appears the dichotomy between federal water quality protection and preservation of states’ water rights over issues of allocation may be overstated in the Agency’s rationale. The Supreme Court and Courts of Appeals have concluded that states’ authority over water quantity and federal water quality controls are intended to operate concurrently, with no “trumping” of federal authority in favor of state allocative control.

3. Indicia of Congressional Intent

Some of the EPA’s more persuasive rationale for the proposed Water Transfers Rule is developed from relevant legislative history. Generally, the

172. Strickland, supra note 159.
173. 511 U.S. 700, 720 (1994) (holding that states could condition certification of projects, pursuant to section 401 of the CWA, “on any limitations necessary to ensure compliance with state water quality standards”).
174. 785 F.2d 814, 821 (9th Cir. 1986).
175. Id. at 821–22.
EPA noted that issues of water quantity have traditionally been managed at the state level, and that Congress did not intend to create "unnecessary Federal interference" with state water rights. Speaking directly to congressional intent, the 2005 EPA legal memorandum concludes that "[b]ecause the NPDES program only focuses on water pollution from point source discharges, it is not the kind of comprehensive program that Congress believed was best suited to addressing pollution that may be associated with water resource management"—that is, the quantitative and physical allocation of water resources throughout a state. To support this conclusion, the EPA cited legislative history indicating that Congress endeavored to "insure that State water allocation systems [were] not subverted." In addition, when discussing the flow diversion provision of the CWA, a House Committee Report instructed the EPA to be "diligent in [the] gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as... natural and manmade changes in the normal flow of surface and ground waters." Examining such statements gives rise to the conclusion that Congress may have considered water transfers, or flow diversions, to be within the purview of nonpoint pollution control methods. Thus, the EPA correctly states that sections 304(f) and 101(g) evince a concern for federalism and protecting traditional state roles in establishing water policy. Based on the these indicia of congressional intent, the EPA concluded that "Congress intended for water transfers to be subject to oversight by water resources management agencies and State non-NPDES authorities, rather than the permitting program under Section 402 of the CWA." Case law suggests, however, that the EPA's conclusions about congressional intent may be unavailing to a reviewing court. Such a reading of the congressional intent animating the statutory provisions at issue has been contradicted in the First Circuit's opinion in Dubois. The Court of Appeals stated that it did "not believe Congress intended such an irrational result," when criticizing the district court for analogizing the movement of highly polluted water into a pristine pond, to the movement of water "from the top to the bottom of a single pond." In addition, the Dubois court took issue with a unitary waters argument made by the Forest Service after examining the statutory structure of the CWA. The court found "nothing in the statute evincing a Congressional intent to distinguish between 'unrelated' water bodies.

177. Id. at 7.
178. NPDES Water Transfers Proposed Rule, supra note 1 at 32,891 (citing 3 CONG. RESEARCH SERV., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 532 (1978)).
179. Id. (citing H.R. REP. NO. 92-911, at 109 (1972)).
181. See discussion supra Part II.C.ii.
182. Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1297 (1st Cir. 1996).
and related or ‘hydrologically connected’ water bodies.”183 In a final statement regarding Congress’s intent to protect the quality of the waters of the United States, the Dubois court punned, “[w]e cannot allow such a watering down of Congress’ clear statutory protections.”184

Finally, as mentioned in Part II, the Second Circuit has also stated that only after an examination of the ordinary meaning of statutory text, would it examine the legislative history of the statute.185 The court’s findings in Catskill I provide an important contrast to the EPA’s arguments:

The legislative history is silent on the meaning of “addition.” Instead, [New York City] relies principally on evidence from other provisions of the statute that Congress sought (1) to target industrial and municipal wastes specifically, and (2) to leave the regulation of water supply—and therefore dam and reservoir operations—to the states. Yet like many complex statutes... the CWA balances a welter of consistent and inconsistent goals. In contrast with the policies cited by the City, the CWA also expressly includes a broad and uncompromising policy of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.” Artificially transferring water and pollutants between watersheds as the City has done here might well interfere with that integrity...186

The Second Circuit not only considered, but elevated the importance of the CWA’s purpose when analyzing arguments similar to those raised in defense of the proposed rule. The court further appeared to deem such goals “inconsistent” with that of the statute’s purpose of “restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.”187

B. Policy Critique and Conclusions Regarding the Proposed Water Transfers Rule

Beyond shortcomings in legal rationale, the proposed Water Transfers Rule appears to be a policy choice that significantly heightens the risk of impaired water quality. Recent administrative actions and judicial decisions have resulted in a trend toward diminishment in the scope of Clean Water Act jurisdiction.188 This proposal by the EPA to forgo water quality protection and regulation for water transfers to hydrologically distinct water bodies is not an isolated reduction in CWA authority. Other final rules and proposed rules have

183. Id. at 1298.
184. Id. at 1299. It bears noting that the EPA did not explicitly espouse the unitary waters theory in its memo.
185. See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill I), 273 F.3d 481, 493 (2d Cir. 2001).
186. Id. at 493–94.
187. Id. at 494.
recently been promulgated, further reducing the universe of "discharges" necessitating a NPDES permit. For example, the EPA has proposed a rule allowing concentrated animal feeding operations [CAFOs] owners to decide whether or not they need a NPDES permit,\textsuperscript{189} although the EPA recognizes that CAFOs "generate about 500 million tons of manure annually."\textsuperscript{190} In addition, the EPA promulgated a final rule in 2006 stating that pesticides are not "pollutants" requiring a NPDES permit when applied "directly to, over, or near water in order to control pests."\textsuperscript{191}

Finally, the Supreme Court recently decided one of the most prominent jurisdictional CWA cases to date, \textit{Rapanos v. United States}.\textsuperscript{192} The only clear principle from the \textit{Rapanos} decision seemed to be that federal authority over wetlands must have a logical stopping point.\textsuperscript{193} The plurality "would generally condition protection on whether a water body is continuously flowing or standing, and would require wetlands to have continuous surface connection to such waters. Justice Kennedy would require a 'significant nexus' between wetlands adjacent to non-navigable tributaries and navigable waters to protect them."\textsuperscript{194} In the wake of this decision the EPA has issued interim guidance, directing staff to avoid commencing enforcement actions concerning waters other than those that would be considered traditionally navigable.\textsuperscript{195}

Thus, the proposed Water Transfers Rule appears especially detrimental from an environmental perspective at a time when the judicial and the executive branches demonstrate a desire to limit the federal regulatory toolbox for water quality protection. It is unadvisable for the EPA to exempt water transfers from the NPDES permitting program while contemporaneously diminishing the hydrologic scope of wetlands protection\textsuperscript{196} and the categorical scope of NPDES requirements through exempting certain pesticide applications and CAFO operators.


\textsuperscript{193} Id. at 716–19.

\textsuperscript{194} Devine, supra note 188, at 330.

\textsuperscript{195} Id. at 329 (noting that this interim guidance was issued on July 5, 2006 and that the final guidance was "still in limbo as of mid-Jan. 2007").

\textsuperscript{196} "Last year, the Corps proposed a package of 4 dozen nationwide permits to discharge dredge or fill material without individualized review, and without taking stock of whether or not the activity can be performed without harming waters."


\textsuperscript{193} Id. at 716–19.

\textsuperscript{194} Devine, supra note 188, at 330.

\textsuperscript{195} Id. at 329 (noting that this interim guidance was issued on July 5, 2006 and that the final guidance was "still in limbo as of mid-Jan. 2007").
C. Consequences and Impacts of the Proposed Water Transfers Rule

Following the publication of the proposed Water Transfers Rule, a myriad of interested parties voiced arguments in the debate on the applicability of NPDES permits to water transfers. The EPA and entities representing western states’ interests and hydrological engineering industries have issued articles and comments supporting the proposed rule. For example, the EPA Assistant Administrator for Water has stated that “[t]he Water Transfer Rule gives communities needed flexibility to protect water quality, prevent costly litigation and promote the public good.”197 In addition, the Agency has indicated that thousands of water transfer arrangements currently in place across the country are vital to the water infrastructure, providing public water supplies, irrigation, power generation, flood control, and environmental restoration.198

Further, the EPA has solicited comments in the Federal Register Notice on the Proposed Rule on whether states should “have the discretion to issue a permit on a case-by-case basis if a transfer would cause a significant impairment of a designated use and no State authorities are being implemented to adequately address the problem.”199 The proposed rule currently contains no such caveat, as originally considered by the Agency. However, the proposed rule does provide that “regardless of whether it includes this designation authority in the final rule or not, States retain the authority under State law to regulate water transfers as they see fit, including requiring permits for such transfers.”200 Such an addition to the proposed rule may further enable the EPA to defend challenges from groups decrying the environmental effects of the rule, by demonstrating a concern for state water quality issues. Providing states with discretion to condition permits on certain indicia of water quality may alleviate concerns regarding water quality of particularly pristine receiving waters or fragile receiving aquatic ecosystems, while allowing states to retain control over allocation of its water resources.

As noted throughout this Comment, western water officials have proffered some of the strongest resistance to the applicability of NPDES permitting requirements to water transfers. Transmountain diversions, such as Denver’s Moffat Collection System, Colorado’s Big Thompson Project, and Colorado’s Homestake I Project, provide examples of complex transfer systems with a multitude of diversions and conveyances that would potentially be affected by any permitting regime.201 In fact, water officials’ concerns with the cost of

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198. Id.
199. NPDES Water Transfers Proposed Rule, supra note 1 at 32,892–93.
200. Id. at 32,893.
201. For a detailed presentation of the impacts on these transfer projects, see Nichols, supra note 45, at 121–22 (describing the impact on these systems which would fall under the definition of a point source pursuant to Miccosukee because “each of these transfers . . . would not naturally receive” the water).
administering a new permitting system for water transfer schemes that have, in some cases, been operational for decades, was essentially paraphrased by the Supreme Court in *Miccosukee*. There, the Court expressed concern that NPDES permits and their attendant water treatment requirements might "raise costs of water distribution prohibitively," and further noted the potential imposition on state authority over water allocation.

Finally, the proposed rule also benefits hydroelectric facilities and companies in terms of cost and certainty. Specifically, the preamble expressly includes the movement of water through a dam as a discharge excluded from the NPDES permit requirement. Such an interpretation regarding dams and the rule's applicability to transfers between two bodies of water may reduce litigation against these facilities under section 402 of the CWA. The proposed rule's definition excluding dams was likely particularly critical for the hydroelectric industry, as the movement of water through dams and its effect on the receiving water body was extensively litigated in the wave of "the dam cases" jurisprudence.

The water quantity versus quality debate further intensifies when exploring the concerns of many eastern states and environmental groups.

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202. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 108 (2004). The Supreme Court opined on the effect that a decision that NPDES permits are required for every engineered diversion might have for Western states' existing water infrastructure:

Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. §1251(g).

203. Id. at 108.

204. NPDES Water Transfers Proposed Rule, supra note 1, at 32,891–92.

205. Id.

206. The Clean Water Network is one of the most vocal opponents of the proposed rule. The Clean Water Network represents "environmentalists, commercial fishermen, recreational anglers, surfers, boaters, farmers, faith communities, environmental justice, labor unions, consumer advocates, and others." Clean Water Network, About, http://www.cleanwaternetwork.org/about/index.cfm (last visited Mar. 11, 2008). The Clean Water Network argues that the Rule allows "dirty, polluted water [to be pumped] into clean water without being regulated . . . . The applicability of this rule spans many industries and has major implications for water quality all across the country. Unregulated water transfers . . . also raise serious human health risks for people who come in contact with these waters or
Stated simply, their apprehension is the same as that animating the NPDES permitting program itself: the movement of pollutants into a body of water with higher water quality. Environmentalists express concern over the potential for grave impairment of national water quality, safeguarded by the Clean Water Act. Further, they allege that this rule, as written, could lead to drinking water contamination and interbasin transfer of invasive species, saline water, and nutrient-laden water.\(^2\)

The environmental nonprofit group Earthjustice, which generated a mass comment campaign resulting in 14,489 comments on the Water Transfers Rule,\(^2\) has provided detailed commentary listing specific consequences of exempting water transfers from the NPDES permitting scheme:

Without Clean Water Act permitting for transfers of polluted waters, our nation's water quality could be seriously impaired. Such an approach would open the door to the transfer of salt water into fresh water basins; the conveyance of water infested with invasive species (e.g., zebra mussels) into a body of water that is not; the pumping of warm, sediment-laden lake water into a higher-altitude, high quality trout stream with cold and clear water; and the man-induced drainage of collected waters containing high levels of polluted runoff, including phosphorus, into separate and sensitive watersheds ...\(^2\) Such comments on invasive species, salt water infiltration into fresh water, and the transfer of water with fundamentally different qualitative characteristics such as temperature, and sediment and pollutant levels, highlight the serious and deleterious ecological consequences of this proposed rule.

In addition, several eastern states joined the debate by filing amicus briefs during the *Miccosukee* litigation. For example, thirteen states indicated that the federal government's position in *Miccosukee*, and the position ultimately adopted by the EPA, would nullify the administrative cost and effort states have already spent implementing CWA provisions regarding specific waterbody quality standards.\(^2\) Lead by New York, these thirteen states argued that,

[i]to abrogate the permit requirement and adopt the United States’ dubious theory would be manifestly inconsistent with the Act, and deprive States of
effective tools to monitor, maintain, and achieve water quality consistent with the designated use and water quality criteria applicable to each individual water body within their borders.211

The outcome of the debate remains to be seen. As of this writing, the proposed rule is undergoing interagency review with the Office of Management and Budget. This three-month process of meeting with various agencies and reviewing their comments was likely completed in early 2008. The EPA Office of Water anticipates promulgating the final rule in 2008.

CONCLUSION

A. Preview of Potential Legal Challenges to the Water Transfers Rule

The myriad comments received by the EPA during the extended comment period for the proposed rule are likely indicia of the rule’s attendant legal challenges. Such challenges may pit eastern states and environmental groups against western states and industry supporters as potential interveners or amicus brief writers. Potential challenges will revolve around whether the rule, as final agency action, is violative of the provisions of the CWA and is arbitrary, capricious, and otherwise not in accordance with law pursuant to the Administrative Procedure Act.212 Recent case law suggests that if a court finds the language of the NPDES portion of the CWA unambiguous the rule will be struck down: in both Catskill II and Friends of the Everglades, the courts decided that the discharges at issue were subject to NPDES permitting, based on the courts’ conclusion that the statutory language of the CWA was unambiguous.213 Thus, while it appears likely from recent precedent that courts would decide the validity of the rule based upon the unambiguous nature of the statute (“Chevron step one” analysis), a highly deferential “Chevron step two” analysis would follow if a court were to find ambiguity in the word “addition.” A court would then undergo a rigorous examination of the EPA’s interpretation to determine whether it was permissible under the CWA. Ultimately, however, it appears more appropriate to arrest the inquiry at Chevron step one. According to several court decisions, the meaning of the text is plain: a transfer from distinct bodies of water, resulting in the addition of a pollutant from the donor to the receiving water constitutes a discharge subject to the NPDES permit program.

B. Conclusion

Legal precedent, in conjunction with a plain meaning analysis espoused in most prior cases, leads to the conclusion that the rationale for the proposed

211. Id.
213. See discussion supra Part II.E.
Water Transfers Rule is flawed, possibly fatally. Prior courts’ analyses of the NPDES provisions of the Clean Water Act have insisted that the ordinary meaning of “addition” is clear, and under such a reading, water transfers between hydrologically distinct bodies of water require NPDES permits.

Moreover, beyond ordinary meaning, the use of the word “any” as a modifier before “addition” furthers the argument that Congress intended for “addition” to be construed broadly. Although the EPA offers persuasive evidence regarding the statutory structure and legislative history of the CWA, its holistic approach is ultimately unavailing. Judicial review will begin, and may end, with the ordinary meaning of the statutory language at issue. Thus, it may be unlikely that a reviewing court would reach the EPA’s holistic arguments. Yet, even if such arguments were examined, the ultimate goal of the CWA to eliminate discharges and the overarching import of the NPDES provisions may trump the EPA’s federalism arguments. Finally, policy considerations also weigh against the proposed rule. This rule would be especially harmful because of the current diminishment in the CWA jurisdictional scope, as the EPA has recently promulgated additional rules reducing the types of “discharges” necessitating a NPDES permit. It is unadvisable for the EPA to exempt water transfers from the NPDES permitting program while simultaneously reducing the hydrologic and geographic scope of wetlands and water quality protection under the Clean Water Act.